PD-0984-15
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
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IN THE TEXAS
COURT OF CRIMINAL APPEALS

FILED
COURT OF CRIMINAL APPEALS
7/7/2017
DEANA WILLIAMSON, CLERK

WENDEE LONG	**§**	
	§	
V.	**§**	**PD-0984-15**
	§	
THE STATE OF TEXAS	**§**	

MOTION FOR REHEARING

The State of Texas raised, and this Court granted, two issues for review in this case: (1) whether the reasonable-expectation-of-privacy test was the appropriate one; and, (2) if it was *not*, whether the judgment of the court of appeals should be reversed. The State never asked this Court to hold that, if the reasonable-expectation-of-privacy test was appropriate, the judgment of the court of appeals should be reversed. As such, neither party briefed that question.

In an "acutely unfair" move, this Court nonetheless reversed the court of appeals's judgment on that basis. *See McWilliams v. Dunn*, 137 S. Ct. 1790, 1807 (2017) (Alito, J., dissenting) (describing as "acutely unfair" the Court's disposition based on an issue on which review was not granted). "The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research,

but essentially as arbiters of legal questions presented and argued by the parties before them." *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia, J.). "The rule that points not argued will not be considered is more than just a prudential rule of convenience; its observance, at least in the vast majority of cases, distinguishes our adversary system of justice from the inquisitorial one." *United States v. Burke*, 504 U.S. 229, 246 (1992) (Scalia, J., concurring). Deciding only questions presented "give[s] the parties notice of the question to be decided and ensure that [the Court] receive[s] adversarial briefing, which in turns helps the Court reach sound decisions." *McWilliams*, 137 S. Ct. at 1807 (Alito, J., dissenting) (citing *Yee v. City of Escondido, Cal.,* 503 U.S. 519, 536 (1992)).

This Court has repeatedly recognized as much. *See, e.g., Lucio v. State*, 351 S.W.3d 878, 896 (Tex. Crim. App. 2011) ("We decide that this point of error is inadequately briefed and presents nothing for review as this Court is under no obligation to make appellant's arguments for her."); *Busby v. State*, 253 S.W.3d 661, 673 (Tex. Crim. App. 2008) (affirming that this Court has no obligation "to construct and compose" a party's "issues, facts, and arguments with appropriate citations to

authorities and to the record" (internal quotes omitted)). In fact, the same day that this Court reversed the judgment of the court of appeals in this case, it affirmed a judgment of the 14th Court of Appeals on the basis that "requir[ing] an intermediate appellate court to resolve aspects of legal sufficiency neither explicitly raised nor even mentioned in the appealing party's brief 'creates an unworkable burden on the lower courts to act as de facto defense counsel for every defendant who raises the issue of legal insufficiency.'" *Burks v. State*, PD-0992-15 (Tex. Crim. App. 2017) (opinion on reh'g). For Wendee Long, though, this Court saw fit to act as de facto counsel for the State, accepting an argument the State never made.

This Court has the power to order supplemental briefing if it determines, either before or after submission, that the case has not been properly presented in the briefs. Tex. R. App. P. 38.9(b); *see also* Tex. R. App. P. 38.7 ("Amendment or Supplementation. A brief may be amended or supplemented whenever justice requires, on whatever reasonable terms the court may prescribe."). That's what this Court should do in this case. This Court should reconsider its decision otherwise.

Respectfully submitted,

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Certificate of Service

I, the undersigned, hereby certify that, upon filing of this motion, a true and correct copy is being electronically served to the Denton County District Attorney's Office.

/s/ Bruce Anton
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